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Supreme Court of the United States

OCTOBER TERM, 1904.

No. 233.

A. H. LEONARD, GEORGE R. WILSON, E. W. SMITH *ET AL.*

PLAINTIFFS IN ERROR,

versus

THE VICKSBURG, SHREVEPORT & PACIFIC RAILROAD COMPANY,

J. H. McCORMICK, RECEIVER,

AND

C. C. HARVEY.

BRIEF FOR DEFENDANT RAILROAD COMPANY, APPELLEE.

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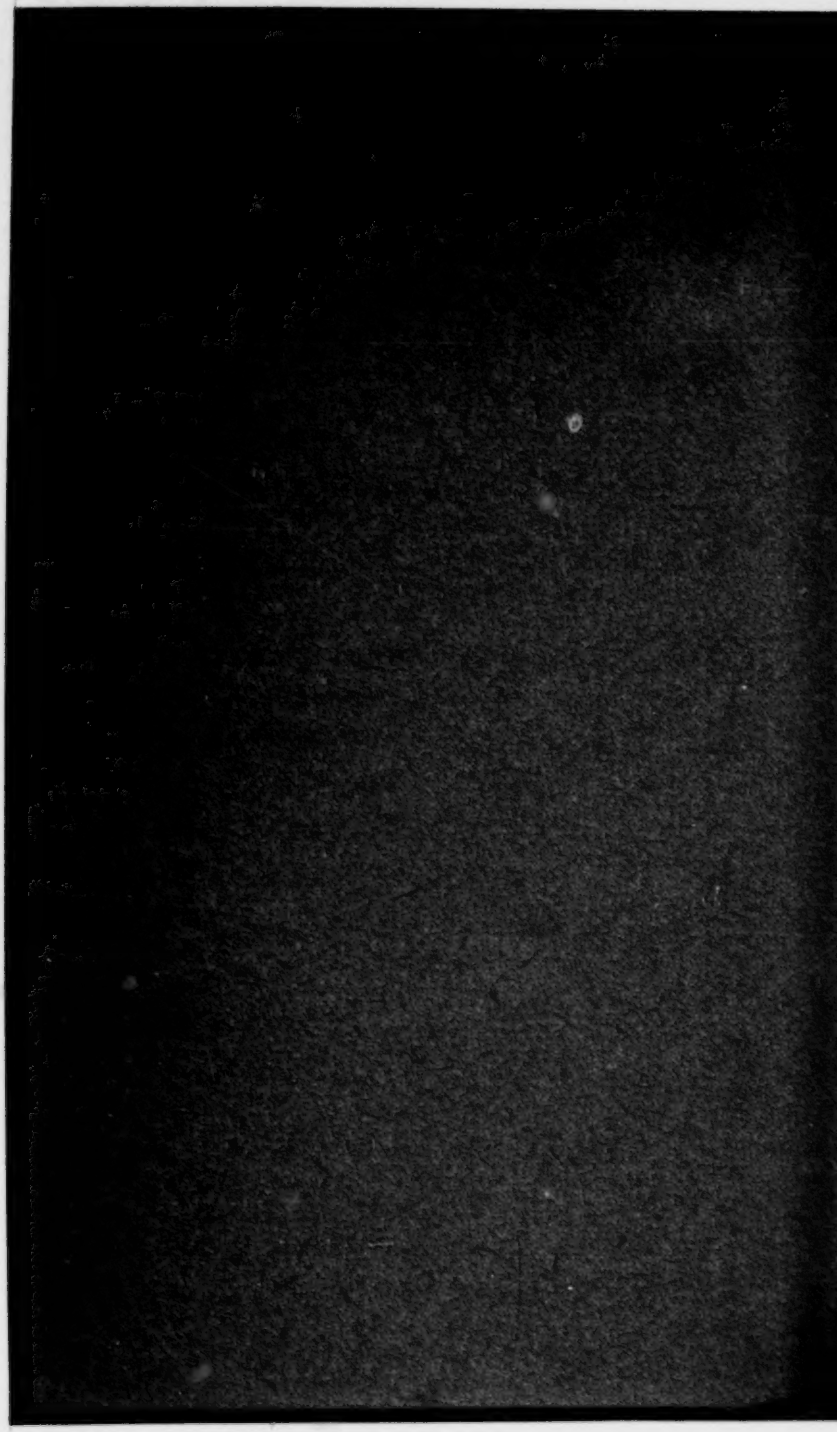

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STATEMENT OF FACTS AND PLEADINGS.

THE PETITION.

The Vicksburg, Shreveport & Pacific Railroad Company, a corporation organized under the laws of the State of

Louisiana, brought this suit in the First District Court of Louisiana, Parish of Caddo, No. 5231, against sundry possessors, Tibbs and others, asking that it be decreed to be the owner of and, as such, put in possession of the following tract of land situated in Caddo Parish, Louisiana, to-wit:

Lots 1, 2, 3, 4, 5, 6, 7, 8 and 9 of Section 31, Township 18, Range 13 west, containing 178 80-100 acres, less a certain parcel of land recovered by Robert N. Smith and others in the suit of Geo. A. Turner *et al.*, and which parcel of land originally formed a part of the said nine lots, and is fully described by metes and bounds, in the petition, and consists of 35 18-100 acres. Plaintiff, therefore, sues herein for 143 62-100 acres. (T., p. 1.)

The Answer.

The possessors, Tibbs and others, made defendants, disclaimed all interest in the property, averring that they were lessees and tenants of A. H. Leonard, Geo. R. Wilson, and the heirs of W. W. Smith, all of whom, for plea and answer to the plaintiff's suit, set up that they, being either the heirs of W. W. Smith or parties privy, instituted a suit, No. 80 on the docket of the Circuit Court of the United States for the Western District of Louisiana, against Geo. A. Turner, alleging and claiming ownership of the entire tract above described, which was known as Silver Lake, and praying to be restored to possession of about forty acres of said tract illegally held by the said Turner.

That, in said suit, Turner appeared, disclaiming title and averring that he was a tenant of the Vicksburg,

Shreveport & Pacific Railroad Company, plaintiff in this suit, and that, thereupon the said railroad company answered, claiming possession and ownership of the entire tract known as Silver Lake.

That, on final hearing, a judgment was rendered in said suit No. 80, in favor of the plaintiffs therein, said heirs of W. W. Smith, *decreeing them to be the owners* OF THE LAND IN CONTROVERSY IN SAID SUIT, *and they were put in possession of the same.*

That the said judgment is effective and final, and has the force and effect of *res adjudicata*, as against all parties to said suit and as against the claims of the plaintiffs herein, and estops it from asserting the said claim. (T., p. 6.)

Further, the said defendants answer that the State of Louisiana sold to W. W. Smith, on the 14th of May, 1853, the said tract of land claimed by plaintiff, for the price of $1.25 per acre, which was paid into the Treasury of the State by the said Smith, and was never returned to him; that, on the 24th of February, 1855, the State of Louisiana, through its constituted authorities, issued a patent to said tract of land to the said Smith.

That the State of Louisiana claimed and acquired the said tract of land as swamp and overflowed land, granted to the State of Louisiana by Acts of Congress of 1849 and 1850, as the Swamp Land Grants, *and that the State sold the said lands to the said Smith as swamp and overflowed lands.*

That all sales of land in Louisiana made as swamp and overflowed land, whether made by the United States or by

the State of Louisiana, and whether the land sold was of that character or not, were confirmed by the Acts of Congress approved March 2nd, 1855, entitled "An act for the relief of purchasers and locators of *swamp and overflowed lands.*"

That the said Act of Congress of March 2nd, 1855, was extended so as to protect sales after its passage, by the Act of Congress of March 2nd, 1857, to confirm all selections of *swamp and overflowed lands* by the several States under the Acts of Congress of 1849 and 1850.

That the said Act of Congress of March 2nd, 1855, confirmed the title of the said W. W. Smith to the said tract of land, whether said land belonged to the State of Louisiana, under the Swamp Land Grant of Congress, or whether it belonged to the United States, and that the said Smith thus acquired a title to the said land, both by purchase from the State of Louisiana and by confirmation by Congress.

That in the case of **R. V. Smith et al. vs. Geo. A. Turner,** the Vicksburg, Shreveport & Pacific Railroad Company substituted, No. 80 on the docket of the United States Circuit Court for the Western District of Louisiana, said railroad company "*claimed a part of the same tract of land now in dispute,*" upon the same title upon which they now rely and which is set forth above.

That judgment was rendered against the said railroad company in said suit No. 80, sustaining the title set up by these defendants, who plead said judgment as *res adjudicata* and estoppel. (T., pages 8, 9 and 10.)

One of the said defendants, Albert H. Leonard, further answering, sets up, in addition to the defense just recited, of his co-defendants, that the said railroad company sued out a writ of error to the Supreme Court of the United States, from said judgment, in said suit No. 80, and that the said Supreme Court dismissed the said writ and affirmed the said judgment, which, thereupon, became final and conclusive. (P. 10.)

PLEA OF RAILROAD COMPANY.

Thereupon J. H. McCormick, receiver for the Vicksburg, Shreveport & Pacific Railroad Company, filed his plea and exception of *res adjudicata* to defendant's answer and plea therein of ownership of the said lands, averring that, in a suit entitled **State of Louisiana vs. W. W. Smith et al.**, No. 5135 of the docket of the District Court of Caddo Parish, Louisiana, filed in 1857, said defendant put at issue the validity and legality of his title to the land described in plaintiff's petition herein, and claimed by virtue of the certificate and patent described in said petition, and, upon final hearing, a judgment was rendered in said suit decreeing said certificate and patent null and void, and decreeing the cancellation of the same and ordering same to be delivered to the State of Louisiana, plaintiff therein.

That in the said suit, No. 5135, defendant obtained an order of appeal from the judgment of Court rendered therein to the Supreme Court, which said appeal was dismissed, and that said judgment is *res adjudicata*, and a perpetual bar to defendant's rights of action. (T., p. 14.)

Opinion and Judgment of the District Court of Caddo Parish.

The opinion and judgment of the Judge of the First Judicial District Court of Caddo Parish, in this suit, No. 5231, is substantially as follows:

Defendant's plea of *res adjudicata* is based upon the fact that, in suit No. 80, United States Circuit Court, **Smith et al.** sued **Turner** for 35.18 acres in the tract of 178.80 acres, known as *Silver Lake*, and recovered a judgment against the Vicksburg, Shreveport & Pacific Railroad Company therefor, as Turner's lessor;

That, on the trial of that cause, counsel for the Vicksburg, Shreveport & Pacific Railroad Company offered to prove that the entire tract of 178.80 acres was worth $10,000.00, whereupon counsel for **Smith et al.** objected upon the ground that the title to the 178.80 acres was not in controversy, but only the title to the 35.18 acres, being the tract sued for. That the question was thus directly put at issue whether the suit involved the title to the entire tract or merely to those particular 35.18 acres for which Turner was sued. The Court says:

> "The same parties who now contend that the decision "in that case constitutes the thing adjudged as to the "entire tract of 178.80 acres, at that time successfully "contended that nothing was at issue except the ques- "tion of right of ownership to 35.18 acres. In his "decision on that point, the presiding Judge said:
>
> " 'The testimony of the above named witnesses was " 'not heard because the petition claimed only the " 'number of acres of land held by or in the possession

" 'of Geo. A. Turner, the defendant; *that the judgment* " '*in this case, if for the plaintiff, could affect only* " '*the land held by Turner.*' " (P. 15.)

The Court says that, when the suit was carried to the Supreme Court of the United States on a writ of error, the attorneys for the Smith heirs moved to dismiss the writ of error, contending that there was no appellate jurisdiction of the Supreme Court, *as the only question at issue was the possession of 35.18 acres of land,* worth not over $2,000.00, and there was no controversy relating to the entire tract of 178.80 acres, worth $10,000.00; and that, in the motion to dismiss the writ of error, they say:

> "It is therefore submitted that no competent question is raised upon the record *except as to property worth about $2,000.00,* and, therefore, the writ of error should be dismissed."

It adds that the Supreme Court of the United States concurred in this view of counsel and dismissed the writ of error, holding that no property was at issue or could be affected by the judgment in the case, except that particular tract of 35.18 acres;

> That "it is now asked of this Court, in this case, "that the said judgment in suit No. 80, awarding to "the Smith heirs 35.18 acres of land, be so extended "as to cover the entire tract of 178.80 acres, and to "ignore that part of the same case in which it is de- "cided, both by the Circuit Court and the United "States Supreme Court, that the decision in that case "in no manner involves the entire tract."
>
> "And thereupon the plea of *res adjudicata* filed by defendant herein is overruled." (T., p. 16.)

As to the plea of *res adjudicata* set up by the Railroad Company against the Smith heirs, the Court finds that, upon the 30th of April, 1853, *an act* was passed by the *Legislature of Louisiana* authorizing the Register of the State Land Office to sell the *shallow lakes* in this State, *provided that such sales should not be made until the lands had become the property of the State and had been legally surveyed and the property recognized;*

That said Act was not promulgated until June 23rd, 1853;

That, on May 14th, 1853, *Crenshaw,* Register, certified that *W. W. Smith* had purchased from the State and had paid $1.25 per acre for the shallow lake known as Silver Lake, in the Parish of Caddo, containing 186.57 acres; that the evidence showed that this area had not been surveyed and listed, at that time, as required;

That a patent issued, on the 24th of February, 1855, for this property, as "SHALLOW LAKE LAND," pursuant to the said Act of the Legislature, *which lake was not claimed to be swamp and overflowed lands.*

That *Crenshaw,* Register of the State Land Office, testified in the case of **The State vs. Smith** that the land sold to Smith *was never claimed as* SWAMP LAND *nor sold as such;*

That *Harleson,* who was Register at the time, testified, in that case, on the 19th of December, 1857, as follows:

> "In the warrant book there is opposite Smith's "entry of Silver Lake, the following words, in the "handwriting of W. H. Crenshaw, Register, to-wit:

" 'This sale is cancelled, because sold in error, the
" 'law not having been promulgated. June 6th, 1853.'
"(Signed) Wm. H. Crenshaw, Register."

That the evidence of Crenshaw shows that the notice of cancellation was served on Smith;

That the evidence further shows that a legal tender of the money paid was made December 3rd, 1857;

That the petition in the suit of the **State of Louisiana vs. W. W. Smith,** sets forth that the Register issued the patent to W. W. Smith to Silver Lake in error. *First,* because the law had not been promulgated; *Secondly,* because the lake had not been surveyed, nor had the surveys ever been recognized by the State; and, *Thirdly,* because the patent was issued by L. J. Sigur, Register, in error of the fact that the law had not been promulgated at the time of the entry, and of the other fact that the entry had been cancelled before the law had been promulgated (p. 17);

That judgment was rendered, on the 24th of November, 1860, in favor of the State cancelling the Smith entry;

That an appeal was taken by Smith, Administrator, returnable to the Supreme Court of Louisiana, on the second Monday of July, 1861, which appeal was not heard by reason of the Civil War, and was not determined until August 11th, 1869, when the said appeal was dismissed, leaving the judgment of the District Court, cancelling the Smith entry, in full force;

That an erroneous certificate of the Clerk of the Supreme Court filed in the case of **Robert N. Smith vs. Geo. A. Turner, No. 80,** as above, caused that record to show that

the case of the **State vs. W. H. Smith** had not been finally disposed of;

That, in the opinion of the Court, it was this certificate which caused the Judge, in the suit No. 80, to hold that the entry of W. W. Smith had not been cancelled;

That in the case of the **Texas & Pacific Railway Company vs. Robert N. Smith et al.**, the United States Circuit Court of Appeals said, in speaking of the title of W. W. Smith:

> "We find that entry to have been cancelled and annulled, the suit of the State and adjudication therein having become final by the action of the highest Court of the State." (P. 18; *Vide* 33, Cir. Ct. Appeals, p. 648.)

And the Court further finds that the title of the Vicksburg, Shreveport & Pacific Railroad Company in and to the lands in question is perfect;

That, the said railroad company was chartered by Act No. 228 of the Acts of the Legislature of Louisiana of 1853;

That, on the 3rd of June, 1856, Congress donated to Louisiana, for the express purpose of aiding in the construction of a railroad on the Texas Line to Greenwood, Shreveport and Monroe to a point on the Mississippi River opposite Vicksburg, every alternate section addition of land for six sections in width on each side of the road;

That in 1857 the State accepted the donation, and granted the lands to the railroad company, the Legislature, at the same session, authorizing the said company to mortgage the said lands; that the said lands were duly selected

and listed as required; that the identical numbers involved in this suit were certified to the railroad company by the United States Government Land Office Department, on October 3rd, 1859, and approved by the Secretary on the same day; that the road was built and the grant earned;

That, in 1858, the United States Land Office Department, passing upon the identical tract of land involved in this suit, decided that it belonged to the railroad company; that the Commissioner of the Land Office held, in March, 1872, that these lands fell within the railroad grant, and the same decision was rendered in March, 1881;

That the title in said railroad company having been repeatedly adjudicated by the Supreme Court of Louisiana and by the Land Office at Washington, its title is considered to be perfect.

And the Court thereupon rendered judgment in favor of said railroad company for the 178.80 acres of land, less the 35.18 acres aforesaid.

This judgment was rendered and signed on the 14th of April, 1903.

An appeal was, thereupon, taken from the said judgment in this suit No. 5231, returnable to the Supreme Court of Louisiana on the second Monday of May, 1903. (P. 21.)

THE OPINION AND DECREE OF THE SUPREME COURT OF LOUISIANA.

On appeal of the said case of the **V. S. & P. R. R. Co. vs. Tibbs et al., Heirs of W. W. Smith et al., substituted,** find that there was a judgment in favor of the State de-

creeing the annulment and cancellation of the patent issued to W. W. Smith and the granting of the land in question to the railroad;

That the Secretary of the Interior had made numerous decisions touching the land in question, which had obtained the force and effect of *stare decisis*, to the effect that the said lands had been earned by the Railroad Company as part of the judgment to it;

That, in the suit of **R. W. Smith et al.**, brought in 1885 in the Circuit Court, for forty acres of land, there was judgment for plaintiff for 35.18 acres, which judgment was taken by writ of error to the United States Supreme Court, where plaintiffs moved to dismiss, on the ground that the Court was without jurisdiction, *for the reason that the value in dispute was that of the particular parcel of land occupied by Turner, and not that of the entire Silver Lake tract*, and the Court, adopting that view, dismissed the writ. (135 U. S. 195.)

The Louisiana Supreme Court, upon these facts, stated that they were unable to follow the reasoning by which the defendants endeavored to show that the judgment in the **Turner** case constituted *res adjudicata* with respect to that title, since, whatever force there might be in the general proposition that a judgment as to the ownership of a portion of a tract of land is conclusive between the same parties, claiming under the same titles, as to the ownership of the whole tract, the fact remains that the final judgment, in any particular case, is the law in that case, and that the thing adjudged in, and hence, the law of the **Turner**

case is precisely the reverse of that for which the defendants contend.

> "And so, with regard to the question of estoppel. The proposition advanced in the **Turner** case, that the title to the whole Silver Lake tract was then at stake—not having been decided adversely to its contention—the present plaintiff is entitled to whatever advantage is to be derived from that ruling, whilst the present defendants, whose position was there sustained, must now take the consequences, and cannot be heard, here, to assert what they, there, denied." (P. 311.)

And the Louisiana Supreme Court, thereupon, considering the plea of *res adjudicata* and estoppel predicated by the Railroad Company on the judgment in the case of **State vs. Smith,** found that the State alleged that the Register of the State Land Office had assumed to sell the Silver Lake tract, under the authority of the Louisiana Act, No. 284 of 1853, which made special provision for the sale of "shallow lakes," as contra-distinguished from swamp and overflowed lands; and further alleged that the sale was made before the act was promulgated, and in disregard of its provisions;

And the Supreme Court finds that there was judgment for the State in the District Court, annulling the title set up by Smith, "being the identical title here set up by his heirs and their transferees." The Court said:

> "From the judgment so rendered, the administrator appealed to this Court, and in 1869, the appeal was dismissed by consent of counsel." (T., p. 312.)

The Court then meets the contention of counsel for the defendants, that a judgment so rendered does not constitute *res adjudicata*, determining the points raised, citing authorities, and deciding adversely to defendant's contention, saying:

"We, therefore, conclude that the plea of *res adju-*
"*dicata*, as set up by the plaintiff, *is good.*

"This conclusion *disposes of the contention that W. W. Smith bought the lands in question as swamp,* "*or* OVERFLOWED LANDS, since the State, in a suit just "referred to, distinctly alleges that it was not so sold, "and its position was sustained by the judgment there-"in rendered. But if it had been sold as lands ac-"quired under the Acts of Congress of 1849 and 1850, "the result would be the same, since it belonged to "that class of land which, under the Act (of Louis-"iana) No. 247 of 1855, could only have been sold "after having been surveyed, and one of the causes "of action set up by the State, in its suit against "Smith, and maintained by the judgment therein "rendered, was, that it had not been surveyed.

"Finally, it is argued that, under the Acts of Con-"gress of 1849 and 1850, title *in præsenti* to all swamp "and overflowed lands within its limits vested in the "State of Louisiana, without regard to selection or "approval; that the land in question was of that char-"acter, and that the State acquired it under those "acts, and, hence, that the United States could not "have granted, and the State (or the Railroad Com-"pany) could not have acquired it under the Act of "June 3rd, 1856.

"The Acts of 1849 and 1850, were, clearly, not in-"tended to operate against the will of the State. On "the contrary, they distinctly left it to the State to "select, subject to the approval of the Secretary of

"the Interior, the lands which it might consider with-
"in the terms of the grant.

"Whether the State might have selected the tract
"in question, and whether said selection might or
"would have been approved, need not be here con-
"sidered. In point of fact, not only was the selection
"not made, and the approval not given, but the grantor
"and the grantee concurred in the view that the tract
"fell within the terms of the Act of 1856, and was
"granted to and acquired by the State of Louisiana,
"as the Trustee of the V., S. & P. R. R. Co. for the
"purpose of aiding in the construction of the railroad
"which that company was to build." (T., page 313.)

And the Louisiana Supreme Court thereupon referred to the interpretation placed by this Court upon the Swamp Land Act of 1850, as given in the case of **Rogers Locomotive Machine Works vs. The American Emigrant, 164 U. S. 359,** a summary of that decision being that the Swamp Land Act of 1850 gave an inchoate title to the State; that the identification of the lands by the Secretary of the Interior was necessary before the title became perfect; that the certificate of the Secretary, in 1858, that certain lands enured to the State under the Railroad Act of 1856, was a decision that they were not embraced by the Swamp Land Act of 1850; that the acceptance by the State of lands certified to it by the Secretary is conclusive upon the State, and that a contract with a county for swamp and overflowed lands gives no better right than the county had to the lands which had been previously certified to the State. (T., p. 313.)

Further, the Louisiana Supreme Court stated that, apart from the defenses which have been thus considered, there appeared to be no objection to plaintiff's title, which had more than once been affirmed by that Court. They refer to **Railroad vs. Sledge, 41 La. An. 896; Moore vs. Kemp, 42 La. An. 1007; State vs. Railroad, 44 La. 981; Railroad vs. Elmore, 46 La. An. 1237.**

And thereupon the judgment of the lower court was affirmed. (T., p. 313.)

THE TRANSCRIPT

further shows:

By a bill of exceptions, filed in the said suit No. 80, it would appear that, on the trial of the said cause, counsel for the Railroad Company offered witnesses to prove that the value of the land in controversy was worth $10,000.00,

> *"whereupon plaintiff's counsel objected, on the ground that the only part of said Silver Lake tract of 186 acres that* WAS IN CONTROVERSY IN THIS SUIT, *was the part alleged to be in the possession of the defendant, Turner, and it was admitted by the counsel for the defendant that the said part or parcel of land was not worth exceeding Two Thousand Dollars."*

And, thereupon, the plaintiff's objection to the said evidence was sustained, because the petition claimed only the number of acres of land held by her in the possession of Geo. A. Turner, the defendant, *"and that the judgment in the case, if for plaintiff,* COULD AFFECT ONLY THE LANDS HELD BY TURNER, *etc."* (P. 72; N., p. 24.)

See likewise same statement in **Vicksburg & R. R. vs. Smith, 135 U. S. 199**, where writ of error was dismissed on motion of Smith for the reasons stated in said bill of exceptions.

A certificate of the Commissioner of General Land Office of December 13th, 1887, shows that the nine lots in question were embodied in the grant to the railroad company, and have been duly approved by the Honorable the Secretary of the Interior, on the 7th of October, 1859. (P. 32.)

Mortgage by the railroad company of this property in 1857. (P. 35.)

Decree of foreclosure upon said mortgage, July 3rd, 1879. (P. 38.)

May 31, 1856, telegram, Commissioner General Land Office to Register and Recorder, Monroe and New Orleans, Louisiana, ordering suspension of sale or location until further orders, of the lands in question. (T., pages 42-43.)

Letters containing the same instructions, June 16th, 1856. (Pages 43-44.)

Letter from the Commissioner General of the Land Office, Washington, June 16th, 1856, to the Governor of Louisiana, enclosing a printed copy of Public Act No. 25, making a grant of land to the State of Louisiana for the construction of certain railroads, approved June 3rd, 1856, said grant being made directly to the State. (T., p. 44.)

Letter from the Commissioner General Land Office to Registers and Recorders in Louisiana, Oct. 22nd, 1856, directing that office to cease to permit location to entries

by pre-emption for any purpose whatever of the land within fifteen miles of the route as definitely fixed by the said railroad.

Certificate of the Governor of Louisiana, dated July 18th, 1884, showing the construction, completion and equipment of the railroad in question. (P. 49.)

Like certificates of the Governor of Louisiana, of Sept. 20th, 1872; 6th of November, 1883; 15th of January, 1884; 14th of March, 1884; 18th of July, 1884. (T., pages 49 *et seq.*)

Certificate to the Honorable the Secretary of the Interior, March 20th, 1872, that the Silver Lake lands were withdrawn from the market on the 31st day of May, 1856, for the benefit of the Vicksburg, Shreveport & Pacific Railroad, and on the 7th of October, 1859, it was approved to the State for the benefit of said road. (P. 63.)

Certificate of the Honorable the Secretary of the Interior, of March 18th, 1881, showing that the land in question lies within the grant to the said Railroad Company. (P. 65.)

Copy of petition filed Nov. 6th, 1885, of the **Heirs of W. W. Smith vs. Geo. A. Turner, U. S. Circuit Court.**

Copy of petition, **State of Louisiana vs. W. W. Smith, No. 5135, Eighteenth Judicial District Court for the Parish of Caddo, filed Dec. 3rd, 1857,** avers that the Legislature of the State of Louisiana passed an act, on the 30th of April, 1853, "authorizing the Register of the Land Office to sell certain SHALLOW LAKES in that State; which act was promulgated on the 23rd of June, 1853, and provided

that the Register of the Land Office at Baton Rouge be authorized to sell *shallow lakes* in the said State, the area of which had been ascertained by surveys, and which are susceptible of being reclaimed, wholly or in part, by draining or leveeing; provided, THAT THIS ACT SHALL NOT APPLY TO ANY SWAMP LANDS in this State; and provided that the said sale shall not be made until the lands have become the property of the State and been legally surveyed and the surveys recognized by the State." (P. 259.)

Petitioner avers that, on the 14th of May, 1853, Crenshaw, Register of the Land Office at Baton Rouge, pretending to act under the said law, sold to W. W. Smith, who pretended to purchase, under said law, certain lands known as Silver Lake, containing 186.57 acres, at $1.25 per acre, for which a certificate of entry was issued by the Register.

Petitioner avers that the certificate of entry of Silver Lake was issued by Sigur, Register; but your petitioner avers that the sale of this Silver Lake land had been cancelled by Crenshaw, Register, on the 10th of June, 1853.

Petitioner avers that the sale, entry and patent were null, because the law had not been promulgated, at the date of the entries, and because this lake had not been surveyed, nor the survey recognized by the State, and because the patent to Silver Lake was issued by Sigur, Register, in error of the fact that the law had not been promulgated at the time of the entry, and also in error of the other fact that the said entry had been cancelled before the law had been promulgated.

Petitioner avers that a legal tender had been made to Smith of the money paid by him; and the petition prayed for the surrender of the patent and certificate of the entry and the cancellation of the same. (P. 259.)

Defendant, after the filing and dismissal of an exception, put in an answer, denying the allegations of the said petition, and claiming ownership of the land in question. (P. 264.)

Evidence of the tender to Smith, in gold, of the purchase price made by him, is shown at page 266.

Act of the Legislature of Louisiana, of April 30th, 1853, authorizing the Register of the Land Office to sell the *shallow lakes* of the State, the area of *which had been ascertained by survey, and providing that such sale should not be made until the lands had become the property of the State, been legally surveyed and the surveys recognized by the State,* is found in transcript, page 269.

Crenshaw, Register, testified that the entry to Smith was made on the 14th of May, 1853; that the same was made by him in error, the law not having been promulgated; that he made an entry to cancel, and, immediately gave notice of the same.

The lands, in question, were never claimed as swamp lands, nor surveyed as such. (P. 274.)

Haralson, acting Register, testified that he had frequently been applied to by persons to enter lakes, but had refused to sell the same, they not having been selected as swamp, and, therefore, not the property of the State. (P. 275.)

Patent issued to W. W. Smith, on the 24th of February, 1855, showing "that said W. W. Smith had purchased with warrant No. 1, a certain SHALLOW LAKE, known as 'Silver Lake,' situated," etc. (P. 277.)

The verdict of the jury, in suit No. 5135, was in favor of the plaintiff, ordering that the certificate and patent to W. W. Smith be annulled and delivered up. (T., p. 277.)

Judgment was rendered, upon said verdict, ordering that the certificate of entry in favor of W. W. Smith

> *"be annulled, avoided and delivered up; and it is further ordered, adjudged and decreed that the patent issued on the 24th day of February, 1855, in favor of W. W. Smith, the defendant, for Silver Lake, in the Parish of Caddo, township 18, ranges 13 and 14, containing 186.57 acres, and issued by L. J. Sigur, Register of the Land Office, be annulled and avoided and delivered up, and that the defendant pay the costs."*

Judgment, November 24th, 1860. (T., page 278.)

Motion for an appeal. (T. page 279.)

The certificate of the Clerk of the Supreme Court of the State of Louisiana, showing that the case of the **State of Louisiana, Appellee, vs. W. W. Smith, Appellant,** was, on the 11th of August, 1869, *dismissed by consent of counsel.* (T., p. 67.)

ASSIGNMENT OF ERRORS.

Upon the refusal by the Supreme Court of Louisiana of an application for a rehearing of the instant cause,

defendants filed a petition and obtained an order for a writ of error to this Court. (T., poges 318-320.)

Attached to this petition is an assignment of errors, the defendants averring that the Supreme Court of Louisiana erred:

First. In overruling the pleas of *res adjudicata* and estoppel based upon the judgment in the case of **Smith vs. Turner, No. 80, United States Circuit Court.**

Second. In refusing to hold that the issues set up in the Federal Court in that case were *res adjudicata.*

Third. In holding that a verdict as to the ownership of part of a tract of land was not *res adjudicata* as to the remainder of the land.

Fourth. In refusing to hold that estoppel resulting from a judgment as against parties and privies extended to every material allegation made on the one side and denied on the other.

Fifth. In refusing to hold that the Acts of Congress usually known as the Swamp Land Grants, were and are grants in *praesenti,* vesting at their date in the State and its assigns title to the land in controversy herein.

Sixth. In refusing to give effect to the reservation made in the Act of Congress of June 3rd, 1856, granting lands to the State of Louisiana in aid of railroads of all lands previously granted to the State by the Swamp Land Grants.

Seventh. In refusing to hold lands granted to the Swamp Land Grants, and in which third parties had

acquired rights, could not be granted by any subsequent Act of Congress.

Eighth. In holding that the Act of Congress of June 3rd, 1856, granting land in aid of railroad, vested title to the land in controversy in the V., S. & P. Railroad, and that, despite the reservation in said Act, the said lands passed under it, although they had been previously granted to the State as Swamp Land Grants.

Ninth. In holding that the V., S. & P. R. R. Co. has a right to the land in controversy.

Tenth. In holding that an action to annul a title to the land, being the real action, may, after the death of the defendant, be revived and prosecuted by citation only to the administrator of the deceased defendant, even though the heirs of said defendant are known and present or represented by agents, tutors or guardians.

Eleventh. In holding that action may be taken, proceedings had and orders made in a cause pending on appeal, in the absence of any party defendant.

Twelfth. In holding that the judgment in the suit of State vs. Smith Heirs had, and has, the force of the thing adjudged.

Thirteenth. In rendering a decree and in entering a judgment in favor of plaintiff against defendants, such judgment and decree being contrary to the law and the evidence. (T., page 320.)

May It Please the Court:

From the foregoing abstract of questions involved, and the manner in which they are raised, the following facts appear:

In 1849 and 1850 the Federal Government granted to Louisiana, to aid in reclaiming the same, all swamp and overflowed lands in that State belonging to the public domain, and which lands, upon survey, selection and approval, were to vest in fee simple in the State, subject to disposal of the Legislature thereof.

April 30, 1853, the Louisiana Legislature authorized the Register of the State Land Office to sell the *shallow lakes* in that State, "provided the sale should not be made until the lands had become the property of the State and had been legally surveyed and the survey recognized."

This law was not promulgated until June 23rd, 1853.

May 14, 1853, *Crenshaw*, Register, certified that, under this inchoate act, W. W. Smith had purchased from the State 186.57 acres, known as Silver Lake.

This had not been surveyed and listed at the time.

June 6, 1853, *Crenshaw*, Register, cancelled the sale to Smith, because made in error under a law which had not been promulgated, and served on Smith notice of this cancellation and making to him formal tender of the price paid.

February 24, 1855, *Sigur*, Register, in ignorance of these facts, issued to said Smith a patent for said Silver Lake.

December 3, 1857, the State of Louisiana brought suit against W. W. Smith to have cancelled the entry, entry

certificate, and patent aforesaid, upon the grounds above stated. Answer was filed and a judgment duly rendered in favor of the State by the District Court, annulling the entry certificate and patent as prayed.

On November 24, 1860, an appeal was taken to the Supreme Court of the State, where, August 11, 1861, after some delay, due to the pendency of the Civil War, the appeal was dismissed and the judgment of the lower court became and, to this day, has remained final.

Meanwhile, the Silver Lake tract, under exact surveys, selection and approval, found to contain 178.80 acres, was, on June 3, 1856, donated to Louisiana to aid in the construction of the railroad in question, the State accepting said donation in 1857 and granting the same to the Railroad Company, the United States certifying to that company, by the identical numbers, the Silver Lake lands involved in this suit.

Notwithstanding the judgment annulling Smith's patent, and the repeated confirmation of the Railroad Company's title, the Heirs of Smith, on the 6th of November, 1885, brought suit in the United States Circuit Court for the Western District of Louisiana, No. 80, of its docket, against Geo. A. Turner, who, they alleged, was in possession of 40 acres of said Silver Lake, for recovery of said 40 acres. The Railroad Company, whose tenant Turner was, defended the suit. There was judgment against the company, presumably due to an erroneous certificate of the Clerk of the Louisiana Supreme Court, showing falsely that the case of **State vs. Smith** had not been disposed of,

and thus causing the Judge to hold that Smith's entry had not been cancelled.

The writ of error taken to the United States Supreme Court from this judgment was dismissed upon the application of the Heirs of Smith, who averred that the only issue involved in the suit of **Smith vs. Turner** was the 35.18 acres in Turner's possession. (135 U. S. 195.)

May 5, 1896, *this* suit was brought by the Railroad Company against the heirs, assigns and possessors of W. W. Smith, in the District Court of Caddo Parish, claiming title to and possession of the Silver Lake property, to-wit: 178.80 acres, less the 35.18 acres recovered in the suit against Turner.

Defendants set up the **Turner** case as *res judicata*, and further alleged that Congress granted the lands in question to the State of Louisiana in 1849-1850; that the State sold them to W. W. Smith, as above set out; that the Act of Congress of March 2, 1855, confirmed all selections of swamp lands made by the State, and confirmed the title to Smith.

The Judge of the District Court rendered judgment in favor of the Railroad Company, as hereinbefore set forth; and, on appeal, the Supreme Court of Louisiana, in a lengthy opinion, affirmed that judgment. The opinion of the Supreme Court of Louisiana is to be found at page 311 *et seq.* of the transcript. (N. 112 La. Rep. 55.)

The Court found no merit in defendant's contention that this title to the 178.80 acres had been maintained in the Turner case, because this Court had dismissed defendants'

writ of error upon their representation that title to only 35.18 acres was involved, thereby depriving them of the judgment of this Court on the question of title. And the Supreme Court of Louisiana, upon the authority of its decisions, found that the judgment rendered in the case of **Smith vs. Smith,** annulling Smith's title, was final, and his heirs and assigns were estopped to again set up that title. The Court held that the land was not bought by Smith as swamp or overflowed land, but if it had been so purchased, as lands acquired under the Acts of Congress of 1849-1850, "the result would have been the same, since it belonged to that class of land which, *under the Act of the General Assembly (of Louisiana)* No. 247 of 1855, could only have been sold after having been surveyed," etc. (T., page 312.)

The Court disposes of the contention that title *in praesenti* to all the swamp land vested in the State, without approval or selection, in direct opposition to the very terms of those acts, by finding, *as a matter of fact,* that the "grantor and the grantee concurred in the view that that "act fell within the term of the Act of 1856, and was "granted to and acquired by the State of Louisiana as the "trustee for the V., S. & P. R. R." (T., page 315.)

And the Court, in support of its conclusions, cites 164 U. S. 559, **Rogers vs. American Emigration Co.**

From this examination of the opinion of the Louisiana Court, it is evident that no Federal question is involved in the case.

The first, second, third and fourth assignments are taken to the failure of the Louisiana Supreme Court to

give full faith due it to the judgment of the United States Circuit Court in suit No. 80, wherein it was decreed that Smith's heirs and assigns were the owners of forty acres of the original Silver Lake tract.

But full effect has been given to *that* judgment, which was duly executed. It is contended, however, that, in the subsequent suit in the State courts, for the remainder of the Silver Lake tract, those courts should have held themselves bound by the *question of law* determined in the Federal Court, whose determination of the title should have the authority of the thing adjudged.

Pretermitting all consideration of the application of the general jurisprudence of this court to the practice of the jurisprudence of Louisiana courts, it is, under certain limitation, true that, in the United States Courts—

> "The general principle announced in numerous causes is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."
>
> **Southern Pacific vs. United States, 168 U. S. 1-48.**

The fact remains that, in particular cases, this doctrine has been modified by this Court:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that

there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action and established by competent evidence, the subsequent allegations of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.

"In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

"The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel.

"These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined.

"It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated; therefore, such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.

"Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defense in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of litigation, and his own situation at the time. A party

acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction."

Cromwell vs. County of Sac, 94 U. S. 351.

Approved in **Keokuk, etc., vs. Missouri, 152 U. S. 315,** and in **Roberts vs. Northern Pacific R. R., 158 U. S., p 27.**

"The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is, therefore, not conclusive in this as to matters which might have been decided, but only as to matters which were, in fact, decided."

Last Chance Mining Company vs. Tyler Mining Company, 157 U. S. 683-687.

Now, the case at bar is clearly an exceptional case. In their brief, at page 21 thereof, counsel for plaintiff in error say:

"Had either party raised other issues than those "raised in the former suit, as, for instance, title by "prescription or by tax sale, or by purchase from a "stranger, or from antagonist's author, the former "judgment would not be *res adjudicata* as to any "of such issues, because they were not raised or de- "cided in such former judgment. But it so happened "in this case that no issues are in fact raised that "were not raised and decided in the former case. "The judgment, therefore, in that case being *res ad- "judicata* of all these issues, they are not open to "controversy in this case."

Is not counsel mistaken?

When the Judge of the Circuit Court, in suit No. 80, decided the issue of the Smith title to the 38.15 acres in controversy, there was in the record an erroneous certificate to the effect that the suit of **State vs. Smith** was still pending undecided in the Louisiana Supreme Court, when, as a matter of fact, that suit had, long before, been dismissed, and the judgment of the lower court, cancelling and annulling the Smith title, had become final.

When, therefore, this suit was brought by the Railroad Company to vindicate its title to the remaining 143.62 acres of the Silver Lake tract, and the defendants set up the original Smith patent, the Railroad Company met the defense wit ha plea of *res adjudicata*, averring that, in the suit of the **State vs. Smith**, a final judgment had been rendered decreeing the cancellation and annulment of said patent and entry.

This raised a new issue which had neither been raised nor determined in suit No. 80.

I submit, therefore, that this was "a point not in litigation" in the former action, and that it "cannot be received as conclusively settled" in this subsequent action.

But would this *res adjudicata*, even in the Federal Courts, apply in the instant case?

When, in the United States Circuit Court, counsel for the Railroad Company asserted that the pending suit for forty acres would be determinative of the ownership of the entire tract, and offered to prove that its value was $10,000, "plaintiffs' counsel objected, on the ground that the only

"part of said Silver Lake tract *that was in controversy in "this suit* was the part alleged to be in the possession of "the defendant Turner."

And the objection was sustained, the Court holding that the evidence was not admissible, because "the judgment "in the case, if for plaintiff, COULD EFFECT ONLY THE "LANDS HELD BY TURNER."

And, on motion of same defendants, suggesting the same limitation, the writ of error was dismissed by this Court.

I submit that it would be intolerable to permit a litigant to successfully maintain that a judgment obtained and executed by him for 35.18 acres of land was conclusive of the title of the remaining 143.62 acres of the same tract, after having, upon his affirmative judicial allegation of the fact, caused the Court, in the first writ, to rule and decide that its judgment "COULD AFFECT ONLY" the 35.18 acres.

I submit that a litigant cannot be permitted to deny his deliberate judicial averments and admissions, especially when made for the purpose and with the effect of depriving an opponent of a legal right, which but for those averments and admissions, it would or might have enjoyed. So, therefore, if the plea of *res adjudicata* were to be determined solely under the jurisprudence of this Court, I submit that it could not be maintained in this exceptional case.

But the failure of the Louisiana Courts to maintain this plea is, in no manner, a failure to give effect to the judgment of the Federal Court. The judgment of that Court was duly enforced and fully executed.

"When the Supreme Court of the State fails to give proper effect to a decree of the Circuit Court of the United States, this court has jurisdiction over its judgments to correct the error."

Dowell vs. Applegate, 152 U. S., p. 327.

But in that case the State Supreme Court treated the decree in question as a nullity and refused to give effect to the same. There was no question of the effect of that judgment upon another and distinct suit brought in the State Court.

The failure to consider suit No. 80 as *res adjudicata* in the subsequent suit was simply the determination by the Louisiana Court of a question of Louisiana law and practice. It considered the Federal judgment precisely as it would have considered the judgment of a State Court. It decided the plea of *res adjudicata* as it had always been determined by the Supreme Court of Louisiana, and without reference to the particular court which rendered the judgment pleaded in bar.

The *Louisiana jurisprudence* on the question of *res adjudicata* differs from that of this Court, which has recognized the difference.

"It is our opinion that the decision made in the case, in 12 Howard, was not intended to reverse the decree in 6 Howard, and that it cannot be so applied as *res adjudicata* to the case we are now trying.

"We will now show the difference as to the character in which Mrs. Gaines then sued and that in which she now does, in connection with the law of Louisiana,

as to what constitutes *res adjudicata* and what does not. In the first suit, her demand was for one-half and four-fifths of another half of the property owned by her father when he died. She then claims as the donee of her mother to the one-half, and as *forced heir of her father* to four-fifths of another half of his estate.

"Now, she claims as universal legatee and legitimate child of her father, under his will of the 13th of July, 1813, which has been admitted to probate by the Supreme Court of Louisiana, and ordered to be executed as such.

"The difference between the two cases is just that which the law of Louisiana will not permit, the decision in the first to be placed against her in this case as *res adjudicata*.

"It is declared in the Article 2265 of the Louisiana Code:

" 'That the authority of the thing adjudged takes place only with respect to what was the OBJECT OF THE JUDGMENT. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be made between the same parties, and affirmed by them against each other in the same quality.' "

Gaines vs. Hennen, 24 Howard, 579.

True it is, that, later, this Court expressed the opinion that the law of Louisiana was in accord with the rulings of this Court:

"It follows, then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for the taxes of other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon

identically the same facts upon which the right of exemption is now claimed.

"And the law of Louisiana is exactly in accord with the rulings of this Court, for, as said by the Supreme Court of Louisiana in *Heroman et al. vs. Louisiana Institute, etc.*, 34 La. An. 805-814," etc.

N. O. vs. Citizens' Bank, 167 U. S., pages 371-398.

But more recently the Louisiana Supreme Court, in the case of **State vs. American Sugar Refining Company**, 108 La., page 603, determined that the cause of action for the suits for licenses of different years, although based upon identically the same statutes and controlled by the same conditions and facts, are not the same causes of action, and said:

"There is not in the case of **Heroman vs Institute**, 34 La. An. 805, anything conflicting with wl we have said in this opinion." (P. 610.)

THE LAW OF LOUISIANA.

Civil Code, Art. 2286 (2265):

"The authority of the thing adjudged takes place only with respect to what was the object of the agreement. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

"The plea of *res judicata* is without force, unless the *object demanded* in the above suit was *precisely* the same as that demanded in the action pending."

Edwards vs. Ballard, 14 La. An. 362.

"The plea of *res adjudicata* is not tenable. To sustain that plea there must be identity of parties, of capacity, of object and of cause of action. One of these, at least, is lacking here. Marcadé says:

"La cause qui doit être la même dans les deux demandes pour que la seconde soit écartée comme déjà jugée, c'est le principe qui engendre immédiatement le droit q'une partie prétend exercer et que l'autre lui conteste—du reste, l'objet se trouve par la réponse à cette question: Que demande le plaideur? et on trouve la cause par la réponse à cette autre question: sur quoi le plaideur fond-t-il immédiatement sa prétension?'

"The relator has carefully excluded from his present demand the salary for the two quarters which formed the object of the demand in the first suit, and upon which there was no adjudication. It seems more probable that, on the part of the respondent, a plea has been confounded with a principle, and that in pleading the judgment in the previous cause as an estoppel, he meant rather that the principle or ruling made by this Court, as then constituted, was conclusive of the right of the relator, or his want of right, on the principle of *stare decisis.*"

State ex rel. Collins vs. Jumel, Auditor, 30 La. An. 863.

And the Court held that the former judgment had not the authority of the thing adjudged.

In the first suit of *Collins vs. Clinton, Auditor,* 26 An. 406, the relator applied for and obtained a *mandamus* to compel the Auditor to warrant on the State Treasury for the two quarters of his judicial salary ending respectively December 31, 1872, and March 31, 1873.

Judge Collins served, under a commission of 1868, up to and until December 14, 1872, when his Court was abolished by the Legislature.

In the above suit, he contended that he was entitled to his salary, notwithstanding that legislative enactment, from the 14th of December until the 31st of March, 1873, claiming that his office was a constitutional one, giving him a vested right to his emoluments during the term fixed by the Constitution.

The Supreme Court of Louisiana, in the *26 Annual* case, decided that he was not entitled to his salary after the 14th of December, 1872. The same Supreme Court, in the *30 Annual* case, held that the plea of *res adjudicata* was not tenable, because the thing sought to be recovered was not the same, he having eliminated, in the second suit, the quarters for which the Supreme Court in the former case had decided he could not recover.

The two decisions are in absolute conflict. In the first, the Supreme Court held that no salary could be recovered after the abolition of the office, while in the second decision it was held that he could recover, and that the plea of *res adjudicata* was not good because suit was brought for different installments of the salary.

"The authority of the thing adjudged must be tested by the requisites of Article 2286 of the Civil Code. The decree is not final unless it falls within the terms of that Article."

Semple vs. Scarborough, 44 La. An. 257.

In this case the tutor of minor children intervened and claimed that certain property sought to be foreclosed had been mortgaged to him as tutor to secure the sum of $3577.21, with interest, and that this mortgage was held as collateral security for a debt of $3468.86. To this demand of the intervenor, the plaintiff pleaded *res adjudicata*, alleging that the tutor, intervenor, had presented an

account of tutorship in which was carried the claim of $3468.66 as due to plaintiff, and that a judgment of the lower Court rendered in favor of the tutor had been reversed by the Supreme Court in the *44th Annual*. The Court held that the issues in the two cases were different; that the action in the latter case was to recover on a note secured by mortgage and, in the other contention, arose about the indebtedness of a succession and the mode of enforcing collection.

> "A decree of *res adjudicata* applies only to matters directly adjudicated. Of two questions, the Court decides one only, and expressly so states; the other question remains undecided and unaffected. The plea of *res adjudicata* does not apply unless the decided question is inseparably connected and carries with it a decision of the accompanying question which was not, in our view, the case here—*i. e.*, in the pending case. Actually adjudicated issues must, in general, be involved in the final judgment in order to be conclusive.
>
> "In our judgment, the basis of the first suit was deficient; the defendant could not be forced to sign the contract of lease. This conclusion did not carry with it a decision of the other issues in case the plaintiff had a right remaining in spite of the fact that the defendant declined to sign the contract of lease."
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> **Laroussini vs. Werlein, 50 La. An. 640.**

In the first suit it was averred that there was a verbal agreement to renew a lease, and the suit was brought to compel the signing of this alleged lease. It was decided that defendant could not be ordered to do so. Thereupon,

the second suit was brought to recover upon the alleged verbal contract and to enforce the same.

"In order that there should be *res adjudicata*, the thing demanded and the cause of action must be the same, and they are not the same in two suits for the licenses of different years.

"In a suit, under a statute imposing a license on refiners of sugar *eo nomine*, the defense being that a refiner of sugar is a manufacturer and, as such, exempt from license taxation, and that, as a consequence, the statute imposing the license is inconsistent with the Constitution, there being no question as to what constitutes a refiner of sugar, the process of refining sugar being the same in all refineries, the sole matter involved is the ascertainment of the meaning of the word 'manufacturer' as used by the Constitution; that is to say, a matter of interpretation of the Constitution—*a question purely of law.*" (*Syllabus.*)

(*"The two license laws involved in the construction of this matter were virtually the same, the latter being substantially a re-enactment of the former, the process used in refining sugar having not changed.*)

"The law of *res adjudicata* is stated with great simplicity and precision by *Article 2286, C. C.*—which formula was borrowed by our Code from the Code Napoleon (*Article 1351*), by the Code Napoleon from Pothier, and by Pothier from the Roman Jurisconsults. It brings out with great distinctness the salient feature of the law of *res adjudicata*, namely, the identity that must exist as to the thing demanded, cause of action, and persons in the two suits * * * and to the same effect are our own decisions. * * *

"The exception of the thing ajdudged is *stricti juris* and, if there should be any doubt as to the identity of the things claimed, or of the persons claiming them, it cannot be maintained. 3 La. 529.

"The plea of *res adjudicata* is without force unless the object demanded in the former suit was precisely

the same as that demanded in the action pending. 14 La. An. 362.

"The only test as to the effect of a decree is its finality as to the matters embraced in it, and its having the requisites of Article 2265 (2286) of the Civil Code. 3 La. An. 203.

"The authority of *res adjudicata* takes place only with respect to what was the object of the judgment. 1 La. An. 92, 30 La. An. 259, 21 La. An. 355, 30 La. An. 861, 41 La. An. 996, 19 La. An. 327, and innumerable other cases.

"Our Court has never wavered that we know of in the rigid execution of the three identities. The thing demanded in the first suit was a certain sum of money which has been paid, and which is neither being demanded a second time nor sought to be recovered back. In two suits for the recovery of the licenses of different years, the statute imposing the license may be said to be the same in the two suits, but the act of the defendant by which the debt for the license is incurred is, each year, a separate, independent act similar to, but not the same as the act by which the debt of the license of the preceding year was incurred.

"In successive suits for cases of this kind one of the causes generative of the cause of action, namely, the law, is the same, but the other generative cause, namely, the act of the defendant, is different, and *res adjudicata* does not obtain.

"It is undeniable that the issue as to whether or not defendant is a manufacturer does occur in both cases, but this issue, as we shall show presently, involves only a question of law, *and there can be no objection to litigating a second time a question of law*, provided the litigation is in connection with different facts. (My italics.)

"The law by virtue of which the object of the judgment is delivered is no part of the object of the judgment. It is only one of the reasons for judgment, and *res judicata* does not take place with respect to the

reasons for the judgment, but only with respect to what was the object of the judgment. *Res judicata* deals, if we may so express ourselves, with the decree of the Court, as contradistinguished from the judgment of the Court. To give it a wider scope than this is to confound it with *stare decisis*. The office and function and utility of *res judicata* is not to settle law questions, but to lend stability to a decree in order that such decree may have effect. *If the second suit leaves the successful litigant in the first suit in the undisturbed possession of the thing decreed to be delivered in the first suit*, there is no ground for *res judicata*. The thing demanded is not then the same. This is well illustrated by the case of *State vs. Jumel, 30 La. An. 861.* There an officer brought suit for that part of his salary accrued up to the time of filing suit, and brought subsequently a second suit for that part of the salary accrued thereafter, and was met in both suits with the defense that the office had been abolished and that no salary was due. The Court held that the part of the salary sought to be recovered in the first suit was not included in the demand of the second suit, and that there was not identity of thing demanded. (My italics.)

"In the case of *City of New Orleans vs. Citizens' Bank of New Orleans, 167 U. S. 371*, the Court conceded that two suits for the taxes of the different years contained different demands, but held that the authority of the thing adjudged took place nevertheless. The conclusion is in conflict with the provisions of the Code, by which the thing demanded and the cause of action (that is, the demand), must be the same. * * *

"Right or wrong, this Court would be bound by the Code, but on the authority of pure reason the Code is presumably right. The decided weight of authority is on its side.

"But the Court, in our humble opinion, is in error in supposing that it is possible for the question to come up under identical circumstances and condi-

tions in two suits, whereof the demands are different. Unless the same thing is being demanded, and for the same purpose, and the demand is being resisted on the same ground of defense, there are not identical circumstances and conditions in the two suits. There may be close similarity. The demands for taxes for different years may be as near alike as two peas, but they are not identical. The identity would be in the defense, but the defense is only a reason for judgment and forms no part of the judgment.

"A different judgment might be rendered on it in the second suit and the full validity, force and effect of the judgment in the first suit remain unimpaired.

"The thing adjudged takes place only with respect to what forms the object of the judgment; and where the defendant contents himself with resisting the demand of the plaintiff, no matter on what ground, the object of the judgment continues to be the demand of the plaintiff. That particular demand which, allowed or rejected, can never again be urged, but the fact of its allowance or rejection, no matter on what ground, cannot preclude the bringing forward another and distinct demand, no matter how closely similar.

"We conclude that the plea of *res judicata* is not well founded, and we pass to the second question in the suit, etc.!"

State ex rel. American Sugar Refining Co., 108 La. Reports, 603 et seq.

And, in this identical cause from which the writ of error is presented, the Louisiana Supreme Court decided that the judgment under discussion is not *res adjudicata* under the law of Louisiana.

Vicksburg, etc., R. R. vs. Tibbs, 112 La. R. 51 (T., pp. 111 *et seq.*).

"The construction by the courts of a State of its Constitution and statutes is, as a general rule, binding

on the Federal courts. We may think that the Supreme Court of the State has misconstrued its Constitution or its statutes, but we are not at liberty to therefor set aside its judgments. That Court is the final arbiter as to such questions."

Forsythe vs. Hammond, 166 U. S. 506-518.

The principal remaining assignments of error are those referring to the erroneous construction of the Acts of Congress of 1849-1850 and 1856; but the decisions of the State courts herein against the Smith title rest upon the decreed illegality of that title for violation, *not* of the Federal statutes, but of the Act of April 30, 1853, *of the Louisiana Legislature,* it having been decreed that Smith had purchased, in violation of the provisions of that act and prior to its promulgation. Hence, had title *in praesenti* vested in the State, the Louisiana Land Register could not sell to Smith under a State enactment not promulgated nor in violation of *its* express provisions.

It has been repeatedly held that the construction of a State statute belongs to the State courts, and is not a Federal question that can be reviewed by the Supreme Court, by writ of error, unless the State court gives such a construction to the State statute as to make it conflict with the Constitution or laws of the United States, and sustains its validity after giving it such construction, and therefore deprives a party of his rights under said Constitution and laws.

Ins. Co. vs. Treasurer, 11 Wall. 204.
Conn. vs. Woodruff, 153 U. S. 689.

Again, it has been stated, as a general rule, that, in order to give the Supreme Court jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that the decision of the Federal question was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

Johnson vs. Risk, 137 U. S. 300, 307.
Desausure vs. Gaillard, 127 U. S. 216.
N. O. vs. N. O. Waterworks Co., 142 U. S. 79.
O'Neil vs. Vermont, 144 U. S. 323, 336.
Northern Pacific R. R. Co. vs. Ellis, 144 U. S. 458.

And this rule has been followed to the point that,

"Even if a Federal question was raised in a State court, yet, if the case was decided on grounds broad enough in themselves to sustain the judgment without reference to the Federal question, the Supreme Court will not entertain jurisdiction."

Conn. vs. Woodruff, 153 U. S. 689.
Sherman vs. Grinnell, 144 U. S. 198.

"Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved, so that the State court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such Federal question by its decision **(Hayward vs. Denny, 158 U. S. 180, 183 and 184)**. Where no Federal question is dealt with, in the opinion of the

appellate court of the State, no Federal question is presented by the record, then the writ of error will be dismissed."

Miller vs. Texas, 153 U. S. 535, 538.

But were this not the law, and had the Louisiana Supreme Court been compelled to rest its own decision upon an interpretation of the Acts of Congress, and had held that they were not grants *in praesenti*, vesting fee immediately in the State, but that such title only vested after survey and acceptance by the State and approval by the Secretary, although a Federal question would be thus raised, it would be so obviously correct, under the adjudications of this Court, that the cause would not be returned.

Rogers Locomotive Works vs. American Emigrant Co., 164 U. S. 559.
Michigan Land, etc., Co. vs. Rusk, 168 U. S. 592.
Brown vs. Hitchcock, 173 U. S. 476.

In **Equitable Life Assurance Society vs. Brown, 187 U. S., p. 308**, this Court said:

"From the foregoing, it results that a claim under the Constitution and laws of the United States was made and decided in the court below, and if the fact that such a claim was formally made and disposed of below without reference to its substantial foundation, determined the question of jurisdiction, the motion to dismiss must be denied. But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. There must be a real substantive question upon which the case may be made to turn; that is, a real, and not merely a formal, Federal question is essential to the jurisdiction of this Court. Stated in another form, the doctrine thus

declared is, that, although in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction, was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy, the motion to dismiss will prevail.

N. O. Waterworks Co. vs. Louisiana, 185 U. S. 336, 345, and authorities there cited." (P. 311.)

In the case of **Richardson vs. The L. & N. R. R. Co., 169 U. S., p. 128,** this Court said:

"But in sustaining the ruling of the trial court and excluding the alleged grant, the Supreme Court (of Florida) rested its decision on the want of authority to make such a grant as it held this to be. Therefore, the contention on behalf of the plaintiff in error is that this Court necessarily has jurisdiction.

"As, however, we entirely concur with the State Court in the view that the grant was not a grant of title, but of a mere license, easement or right of use, and no evidence of prior possession was offered, we need not consider whether the grant, as thus correctly construed, was valid or not, for, even if valid, the ruling on this record could not have been other than it was. That ruling was so obviously correct that we do not feel constrained to retain the case for further argument." (P. 132.)

Further, it is claimed in the twelfth assignment of error that the Supreme Court in holding that the judgment in the suit of *State vs. Smith* has the force and effect of the thing adjudged.

The reasons of the Court on this question of Louisiana law and practice are doubtless conclusive, but the same questions and the same title were considered by the Circuit Court of Appeal, Fifth Circuit, and that Court reached the same conclusion.

Texas & Pacific Ry. Co. vs. Smith et al., 33 U. S. Circuit Court of Appeals, p. 648.

I respectfully submit that there is involved, in this cause, no Federal question, but solely the interpretation of Louisiana statutes; that the judgment annulling and cancelling Smith's patent, more than forty years ago, is conclusive upon his heirs and assigns, and that they are estopped from complaining of that judgment in this suit; and that if the matter could even be considered by this Court your Honors would reach the same conclusion reached by the Supreme Court of Louisiana.

I submit that the writ of error should be dismissed, or, in the alternative, that the judgment of the Supreme Court of Louisiana should be affirmed.

Respectfully submitted,

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